Yazid bin Sufaat & Ors v Suruhanjaya Pilihanraya Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–29 OF 2006
ZULKEFLI, LOW HOP BING AND ZAINUN ALI JJCA
16 JANUARY 2009

Constitutional Law — Fundamental liberties — Right to vote — Whether a voter may vote at any polling station he chooses — Right to vote subject to limitations imposed by statute and regulations — Applicants detained under Internal Security Act 1960 — Whether Election Commission has duty to facilitate casting of votes by ISA the detainees — Whether applicants entitled to vote as postal voters — Conditions to be satisfied before being entitled to vote as postal voters — Whether applicants denied of right to vote — Federal Constitution arts 8, 10 & 119 — Elections (Postal Voting) Regulations 2003 regs 3(1), (2), (3) & (4)

Election — Election Commission — Duties, of — Whether Election Commission has duty to facilitate casting of votes by ISA the detainees — Whether Election Commission has duty to enact rules to facilitate and enable voting by detainees

The applicants were Malaysian citizens detained at the Kamunting Detention Centre, Perak ('the detention centre') under the Internal Security Act 1960 ('ISA'). The applicants were registered in different constituencies throughout the country, not as postal voters, but as regular walk-in voters. When Parliament and the Legislative Assemblies were dissolved on 4 March 2004 to pave the way for the general election, the applicants vide two letters dated 15 and 17 March 2004, informed the Election Commission ('EC') of their rights and intention to vote, and asked the EC to facilitate the casting of their votes during the General Election, scheduled for 21 March 2004. The applicants however, were unable to cast their votes. The applicants sought judicial review and prayed for declarations, inter alia, that the respondent had violated their fundamental rights to vote in the general election. The applicants' action was dismissed by the High Court and hence this appeal. The applicants claimed that the learned judge had erred in law in failing: (i) to give a generous interpretation to arts 8, 10(1)(a) and 119 of the Federal Constitution ('Constitution') in favour of the applicants; and (ii) to decide that arts 113 and 114 of the Constitution read with the Elections Act 1958 impose a duty on the EC to ensure that all Malaysians including the applicants cast their votes through rules and regulations, as guaranteed under art 119 and the EC had therefore breached that duty.

Held, dismissing the appeal with costs:

(1) (per **Low Hop Bing JCA**) A voter's right to vote at any election is a voluntary exercise which is left exclusively to the voter himself or herself. The EC has neither the duty nor the power: (i) to compel a registered voter to vote on polling day; or (ii) to ensure that voters such as the applicants are provided with the necessary facilities to enable them to vote at their respective polling stations (see para 22).

(2) (per **Low Hop Bing JCA**) The applicants had the constitutional right under art 119 to vote in the constituency where they had registered respectively. The applicants' status as ISA detainees and the prohibition against them to leave the detention centre was beyond the EC's jurisdiction, powers, duties and responsibilities. The EC was in no position whatsoever to allow or refuse the applicants to leave the detention centre. That jurisdiction was conferred on the Ministry charged with the responsibility for the detention centre. As that Ministry was not a party, the issue relating to the applicants' status as ISA detainees was irrelevant (see paras 32 & 33).

(3) (per **Low Hop Bing JCA**) The rules made by the EC may give effect to the constitutional right of voters but, being subject to federal law, must not override the ISA. The constitutional right to vote is only to be exercised in the respective constituency where he has registered as a voter under art 119. To enact rules in order to allow the applicants to vote eg in the detention centre or at any other place where they were not registered as voters, would contravene art 119 (see para 34).

(4) (per **Low Hop Bing JCA**) For the applicants to cast their votes as postal voters, they had to come within the purview of reg 3(1) and (2) of the Elections (Postal Voting) Regulations 2003 ('Regulations'). As ISA detainees, the applicants could have invoked reg 3(2) and applied to vote by post. However, the applicants did not invoke reg 3(2). They instead wrote letters to the EC to treat them as postal voters. These letters were written well after the nomination day for the general election (see paras 35 & 36).

(5) (per **Zulkefli JCA**) The appellants' entitlement to vote under art 119 of the Constitution does not allow a registered voter to vote at any polling station he chooses. A registered voter can only vote at the particular polling station where his name has been registered as an elector (see para 3).

(6) (per **Zainun Ali JCA**) The appellants as detainees held under the ISA were not qualified to apply or be categorised as postal voters under reg 3(1)(f) of the Regulations. The appellants were therefore excluded from the category of citizens who are permitted to vote by post (see para 111).

(7) (per **Zainun Ali JCA**) Article 119(2) guarantees that persons detained in custody are still afforded the opportunity to exercise their rights to vote while in detention. It implies that some kind of arrangement need be made for them. Article 113(5), coupled with ss 15 and 16 Elections Act 1958 give such power to the respondent (see paras 114 & 115).

(8) (per **Zainun Ali**) The EC has powers under the Election Act 1958 to make alternative arrangements and provide facilities for electors by enacting rules and regulations for electors who for some reason are unable to vote in their respective constituencies as indicated in the case of prisoners above (see para 116).

(9) (per **Zainun Ali JCA**) Provisions regarding fundamental liberties and rights under the Federal Constitution should be construed as generously as is possible within the constraints that they are placed under. By failing to provide any arrangement to facilitate the casting of votes by the appellants, the respondent had acted arbitrarily and discriminatorily in contravention of arts 8(1), 10(2) and 119 of the Constitution (see paras 127 & 132).

(10) (per **Zainun Ali JCA**) There is no provision in the ISA 1960 which prevents, precludes or bars the appellants from voting. Nothing is expressed in the ISA 1960 which explicitly or otherwise prevents detainees from exercising their right to vote (see para 169).

(11) (per **Zainun Ali JCA**) The respondent's decision was unreasonable or substantially unfair or disproportionate and infringed the substantive legitimate expectations of the appellants. The decision of the respondent was arbitrary (see para 178).

[Bahasa Malaysia summary

Pemohon-pemohon adalah warganegara Malaysia yang telah ditahan di Pusat Tahanan Kamunting, Perak ('pusat tahanan tersebut') di bawah Akta Keselamatan Dalam Negeri 1960 ('AKDN'). Pemohon-pemohon telah didaftarkan dalam kawasan-kawasan berbeza di seluruh negara, bukan sebagai pengundi-pengundi pos, tetapi sebagai pengundi-pengundi biasa. Apabila Parlimen dan Dewan Undangan telah dibubarkan pada 4 Mac 2004 untuk memberi jalan kepada pilihan raya umum, pemohon-pemohon melalui dua pucuk surat bertarikh 15 dan 17 Mac 2004, telah memeklumkan kepada Suruhanjaya Pilihan Raya ('SPR') tentang hak-hak dan niat mereka untuk mengundi, dan bertanyakan SPR untuk memudahkan mereka membuat undian semasa Pilihan Raya Umum, yang dijadualkan pada 21 Mac 2004. Pemohon-pemohon bagaimanapun tidak dapat membuat undian mereka. Pemohon-pemohon memohon semakan kehakiman dan deklarasi-deklarasi, antara lain, bahawa responden telah melanggar hak-hak asasi mereka untuk

A mengundi dalam pilihan raya umum. Tindakan pemohon-pemohon telah ditolak oleh Mahkamah Tinggi dan justeru itu rayuan ini. Pemohon-pemohon telah mendakwa bahawa hakim yang bijaksana terkhilaf dari segi undang-undang kerana gagal: (i) untuk memberikan pentafsiran luas kepada perkara-perkara 8, 10(1)(a) dan 119 Perlembagaan Persekutuan
B ('Perlembagaan') yang menyebelahi pemohon-pemohon; dan (ii) untuk memutuskan bahawa perkara-perkara 113 dan 114 Perlembagaan dibaca dengan Akta Pilihan Raya 1958 meletakkan kewajipan ke atas SPR untuk memastikan bahawa semua rakyat Malaysia termasuklah pemohon-pemohon membuat undian mereka melalui peraturan-peraturan, seperti yang dijamin
C di bawah perkara 119 dan SPR dengan itu telah melanggar kewajipan tersebut.

D **Diputuskan,** menolak rayuan dengan kos:

(1) (oleh **Low Hop Bing HMR**) Hak pengundi untuk mengundi di mana-mana pilihan raya adalah amalan sukarela yang eksklusif kepada pengundi sendiri. SPR tiada kewajipan mahupun kuasa: (i) untuk memaksa pengundi berdaftar untuk mengundi pada hari pilihan
E raya; atau (ii) untuk memastikan bahawa pengundi-pengundi seperti pemohon-pemohon diberikan kemudahan yang perlu untuk membolehkan mereka mengundi di tempat pilihan raya mereka masing-masing (lihat perenggan 22).

F (2) (oleh **Low Hop Bing HMR**) Pemohon-pemohon mempunyai hak perlembagaan di bawah perkara 119 untuk mengundi di kawasan di mana mereka telah berdaftar. Status pemohon-pemohon sebagai tahanan-tahanan AKDN dan larangan ke atas mereka untuk meninggalkan pusat tahanan melampaui bidang kuasa, kuasa,
G kewajipan dan tanggungjawab SPR. SPR bukan dalam kedudukan apa sekalipun untuk membenar atau menolak pemohon-pemohon meninggalkan pusat tahanan tersebut. Bidang kuasa tersebut telah diberikan ke atas Kementerian yang bertanggungjawab ke atas pusat tahanan tersebut. Memandangkan Kementerian tersebut tidak
H merupakan pihak, isu berkaitan status pemohon-pemohon sebagai tahanan-tahanan AKDN adalah tidak relevan (lihat perenggan 32, 33).

(3) (oleh **Low Hop Bing HMR**) Peraturan-peraturan yang dibuat oleh SPR boleh memberi kesan kepada hak perlembagaan pengundi-pengundi tetapi, oleh kerana tertakluk kepada
I undang-undang persekutuan, tidak boleh mengatasi AKDN. Hak perlembagaan untuk mengundi hanya boleh dilaksanakan dalam kawasan di mana seseorang itu telah didaftarkan sebagai pengundi di bawah perkara 119. Untuk menggubal peraturan-peraturan bagi tujuan membenarkan pemohon-pemohon mengundi contohnya

di pusat tahanan tersebut atau di mana-mana tempat di mana mereka tidak didaftarkan sebagai pengundi, adalah bercanggah dengan perkara 119 (lihat perenggan 34). A

(4) (oleh **Low Hop Bing HMR**) Bagi pemohon-pemohon membuat undian mereka sebagai pengundi-pengundi melalui pos, mereka perlu terangkum di bawah skop peraturan 3(1) dan (2) Peraturan-Peraturan Pilihanraya (Pengundian Pos) 2003 ('Peraturan tersebut'). Sebagai tahanan AKDN, pemohon-pemohon boleh menggunakan peraturan 3(2) dan memohon untuk membuat undian melalui pos. Walau bagaimanapun, pemohon-pemohon tidak menggunakan peraturan 3(2). Mereka sebaliknya telah menulis surat kepada SPR untuk menganggap mereka sebagai pengundi-pengundi melalui pos. Surat-surat tersebut telah ditulis selepas hari pencalonan untuk pilihan raya umum (lihat perenggan 35, 36). B C

(5) (oleh **Zulkefli HMR**) Hak perayu-perayu untuk mengundi di bawah perkara 119 Perlembagaan tidak membenarkan pengundi berdaftar untuk mengundi di mana-mana kawasan undian yang dipilihnya. Seorang pengundi berdaftar hanya boleh mengundi di kawasan undian tertentu di mana namanya telah didaftarkan sebagai pengundi (lihat perenggan 3). D E

(6) (oleh **Zainun Ali HMR**) Perayu-perayu sebagai tahanan-tahanan yang ditahan di bawah AKDN tidak layak untuk memohon atau dikategorikan sebagai pengundi-pengundi melalui pos di bawah peraturan 3(1)(f) Peraturan tersebut. Perayu-perayu dengan itu dikecualikan daripada kategori warganegara yang dibenarkan untuk mengundi melalui pos (lihat perenggan 111). F

(7) (oleh **Zainun Ali HMR**) Perkara 119(2) menjaminkan bahawa sesiapa yang ditahan dalam tahanan masih diberikan peluang untuk melaksanakan hak-hak mereka untuk mengundi semasa dalam tahanan. Ia menandakan bahawa sesuatu perlu diatur untuk mereka (lihat perenggan 114, 115). G

(8) (oleh **Zainun Ali HMR**) SPR mempunyai kuasa-kuasa di bawah Akta Pilihanraya 1958 untuk membuat aturan alternatif dan memberikan kemudahan kepada pengundi-pengundi dengan menggubal peraturan-peraturan untuk pengundi-pengundi yang oleh sebab tertentu tidak dapat mengundi di kawasan tertentu mereka sepertimana yang dinyatakan dalam kes banduan-banduan di atas (lihat perenggan 116). H I

(9) (oleh **Zainun Ali HMR**) Peruntukan-peruntukan berhubung kebebasan dan hak-hak asasi di bawah Perlembagaan Persekutuan hendaklah ditafsirkan seluas mungkin dalam batasan yang diletakkan. Dengan kegagalan untuk memberikan kemudahan agar perayu-perayu

A dapat membuat undian, responden telah bertindak sewenang-wenangnya dan membuat perbezaan yang bertentangan dengan perkara-perkara 8(1), 10(2) dan 119 Perlembagaan (lihat perenggan 127, 132).

B (10) (oleh **Zainun Ali HMR**) Tiada peruntukan dalam AKDN yang menghalang, mengecualikan atau membatas perayu-perayu daripada mengundi. Tiada apa yang dinyatakan dalam AKDN yang dengan jelas atau sebaliknya menghalang tahanan-tahanan daripada melaksanakan hak mereka untuk mengundi (lihat perenggan 169).

C (11) (oleh **Zainun Ali HMR**) Keputusan responden adalah tidak munasabah atau tidak adil atau tidak seimbang dan telah melanggar harapan sah substantif perayu-perayu. Keputusan responden telah dibuat sewenang-wenangnya (lihat perenggan 178).]

D **Notes**

For cases on Election Commission in general, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1972–1973.

For cases on fundamental liberties in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2001–2183.

E

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, CA (refd)

August & Anor v Electoral Commission & Ors 1999 SACLR LEXIS 1, CC (not folld)

F

Central Province & Bear Sales of Motor Spirit v Lubricants Taxation Act, Re AIR 1939 FC 1 (refd)

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141, HL (refd)

G

Datuk Yong Teck Lee v PP & Anor [1993] 1 MLJ 295, HC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (refd)

Election Commission, Malaysia v Abdul Fatah bin Haji Haron [1987] 2 MLJ 716, SC (refd)

H

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar & Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (refd)

Gould v Attorney General of Canada [1984] 1 FC 1119 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

I

Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1, CA (refd)

Levesque v Canada (Attorney General) [1986] 2 FC 287 (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (folld)

Maneka Gandhi v Union of India AIR 1978 SC 597 (refd)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah [2004] 2 CLJ 777, FC (refd)
Petroliam Nasional Bhd v Nik Ramli bin Nik Hassan [2000] 2 MLJ 272, CA (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Saman Gulam v Tan Sri Haji Mohd Sunoh Marso & Ors [1987] 2 MLJ 718, SC (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah [1998] 3 MLJ 289; [1996] 2 AMR 1617, CA (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 AMR 167, CA (refd)

Legislation referred to

Constitution of South Africa s 19
Elections Act 1958 ss 5, 5(1)(a), (b), (d), 15, 16, 16(2)(f), (2)(l)
Elections (Conduct of Elections) Regulations 1981 regs 5, 14, 14A, 15(1)
Elections (Postal Voting) Regulations 2003 reg 3(1), (1)(f), (2), Form 1
Elections (Registration of Electors) Regulations 2002 reg 2
Federal Constitution Part VIII, arts 4(5), 5, 8, 8(1), 9, 10, 10(1)(a), (2), 13, 55(2), (4), 113, 113(1), (5), 114, 115, 119, 119(1), (2), (3), (4)(a), 149, 149(a), (b), (c), (d), (e), (f)
Indian Constitution [IND] art 14(a)
Internal Security Act 1960 s 8

Appeal from: Application For Judicial Review No R1–25–61 of 2004 (High Court, Kuala Lumpur)

Edmund Bon Tai Soon (Sunil Lopez and Nik Ikhwan with him) (Chooi & Co) for the appellant.
Azizah Nawawi (Suzana Atan with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Zulkefli JCA:

[1] I have read the judgment in draft of my learned sister Zainun Ali JCA and the judgment of my learned brother Low Hop Bing JCA in respect of this appeal by the appellants. With utmost respect to the judgment of Zainun Ali JCA, I am more inclined to agree with the views expressed by Low Hop Bing JCA in his judgment that there is no merit in the appeal. I would like to add in and state my views on some of the issues raised in the appeal as follows:

[2] On the appellants' contention that Part VIII, arts 113 and 114 of the Federal Constitution ('FC') read with the relevant provisions of the Elections Act 1958 ('EA') imposes a duty on the respondent to ensure that all Malaysian citizens, including the detainees under the preventive detention law, who are registered voters to cast their votes, through rules and regulations as guaranteed under art 119 of the FC, I am of the view that there is nothing in both the FC and the federal laws which cast a duty upon the respondent to ensure that every registered voter in Malaysia must cast his vote on polling day. It is to be stated also on this point that there cannot be a breach of duty by the respondent as in the present case where none exists in law (see the case of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777). I am also of the view that it is not the duty of the respondent to ensure that detainees at the detention centres can vote on polling day as art 119 of the FC clearly provides that a registered voter has a constitutional right to vote only in that constituency where he had registered, that is, in the constituency in which he resides on the qualifying date.

[3] It is my view that the appellants' entitlement to vote under art 119 of the FC does not allow a registered voter to vote at any polling station he chooses. A registered voter can only vote for the particular constituency and at the particular polling station where his name has been registered as an elector. As with regards to the fact that the appellants are detained as detainees under the Internal Security Act 1960 ('ISA 1960') at Kamunting Detention Centre ('KDC') and therefore not allowed to leave the said detention centre, it is my judgment that this is not a relevant consideration as art 119 of the FC clearly provides that the constitutional right of a voter can only be exercised in the respective constituency where he had registered as a voter. The issue of allowing the appellants to get out of KDC and go to their respective constituencies to vote is beyond the power and jurisdiction of the respondent.

[4] On the appellants' reliance of the provision of art 113(5) of the FC that the respondent has a very wide and unlimited discretion to make rules and regulations to enable the appellants to cast their votes, I am of the view that the rules to be enacted are only for the purposes of the respondent's functions under the said art 113 of the FC which is to conduct the elections and the same are still subject to Federal Laws. Whatever laws the respondent may enact cannot contravene the provisions of the ISA 1960. Further, the rules enacted must give effect to art 119 of the FC, namely that the constitutional right of a voter can only be exercised in the respective constituency where he had registered as a voter.

[5] On the issue of postal voters which the appellants contended that the respondent could have included them as postal voters, it is to be noted that the appellants have never made any formal application to be registered as postal voters under reg 3(1)(f) of the Elections (Postal Voting) Regulations 2003. I wholly agree with the view expressed by the learned trial judge that even, if the letters from the appellants can be said to be an implied application to the respondent to treat them as postal voters, it is too late for the respondent to take the necessary actions. The respondent only received the first letter from the appellants on 18 March 2004. Under reg 14A of the Elections (Conduct of Elections) Regulations 1981, the authoritative text of the electoral rolls must be submitted to the candidates on the day of the nomination. The nomination day in the previous general election was 13 March 2004. Thus, the authoritative text should contain the names of the appellants as regular voters in the constituencies where they have registered. I am therefore of the view since the appellants are not postal voters, there was no violation of their rights when the respondent did not provide them with the postal ballot papers.

[6] For the reasons above stated, I would dismiss the appellants' appeal with costs. Deposits to the respondent on account of taxed costs.

Low Hop Bing JCA:

APPEAL

[7] For brevity and convenience, a reference in this judgment to an article is a reference to that article in the Federal Constitution.

[8] On 27 April 2004, 22 applicants sought judicial review and prayed for declarations that the respondent had violated the applicants' fundamental rights viz:

(1) to vote in the 11th general election ('the general election') under art 119;

(2) to freedom of speech and expression in the general election under art 10(1)(a); and

(3) to equality before the law and equal protection of the law under art 8.

[9] The applicants also included a prayer for an order of certiorari to quash the decision and action in the respondent's refusal, failure, denial and neglect to enable and allow them to vote in the General Election.

A FACTUAL BACKGROUND

[10] The applicants are Malaysian citizens. They were detained at the Kamunting Detention Centre, Perak ('the detention centre').

B

[11] The respondent is the Election Commission ('EC') established under art 114.

[12] When Parliament and the Legislative Assemblies (except Sarawak) C were dissolved on 4 March 2004 to pave the way for the general election, the applicants vide two letters dated 15 and 17 March 2004, informed the EC of their rights and intention to vote, and asked the EC to facilitate the casting of their votes during the general election, scheduled for 21 March 2004.

D

[13] The applicants alleged that they were unable to cast their votes.

[14] The applicants were not registered as voters in the constituency where the detention centre is situated. Instead, they were registered in different E constituencies throughout the country, not as postal voters, but as regular walk-in voters.

EC'S DUTIES

F

[15] Learned counsel Mr Edmund Bon Tai Soon (Ms Sunil Lopez and Mr Nik Ikhwan with him) referred to, inter alia, the South African case of *August & Anor v Electoral Commission & Ors* 1999 SACLR LEXIS 1 to support their submission for the applicants that the learned judge had erred G in law in failing:

(1) to give a generous interpretation to arts 8, 10(1)(a) and 119 in favour of the applicants; and

(2) to decide that arts 113 and 114 read with the Elections Act 1958 H impose a duty on the EC to ensure that all Malaysians including the applicants cast their votes through rules and regulations, as guaranteed under art 119 and the EC had therefore breached that duty.

[16] Ms Azizah Hj Nawawi, learned senior federal counsel (Ms Suzana I Atan with her) subscribed to a diametrically opposite view, contending that there was no breach of duty on the part of the EC. Reference was made to:

(1) *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777 (FC);

(2) *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar & Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 (SC);

(3) art 113(5);

(4) s 5 of the Elections Act 1958;

(5) Elections (Conduct of Elections) Regulations 1981;

(6) Elections (Registration of Electors) Regulations 2002;

(7) Elections (Postal Voting) Regulations 2003;

(8) *Election Commission, Malaysia v Abdul Fatah bin Haji Haron* [1987] 2 MLJ 716 (SC); and

(9) *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC).

[17] The learned judge upheld the contention presented for the EC.

[18] I would commence by stating that the EC, under art 114, is entrusted with the duties and responsibilities, inter alia, to conduct elections to the House of Representatives and the Legislative Assemblies of the States; to prepare and revise electoral rolls for such elections (see eg *Abdul Fatah bin Haji Haron*, *Saman Gulam v Tan Sri Haji Mohd Sunoh Marso & Ors* [1987] 2 MLJ 718 (SC).

[19] Section 5(1)(a) of the Elections Act 1958 ('s 5(1)(a)') also sets out the duties of the EC to exercise control and supervision over the conduct of elections and registration of electors on the electoral rolls, and to enforce, on the part of all election officers, fairness, impartiality and compliance with Part VIII of the Federal Constitution, the Elections Act 1958 and all the regulations governing elections.

[20] Additional detailed duties of the EC under s 5(1)(a) are amplified in the Elections (Conduct of Elections) Regulations 1981; while the duties of the EC to prepare and revise the registration of voters on the electoral rolls are contained in the Elections (Registration of Electors) Regulations 2002 and the Elections (Postal Voting) Regulations 2003, respectively.

[21] In this judgment, I shall use the words 'electors' and 'voters' interchangeably. The Elections Act 1958, and all the regulations governing elections are collectively referred to as 'the election laws'.

[22] Upon a proper perusal of the Federal Constitution and the election laws, I find that a voter's right to vote at any election is manifested in an unfettered and untrammeled voluntary exercise which is left exclusively to the

A voter himself or herself. Our Federal Constitution and election laws do not provide for any sanction or punishment against a voter who chooses not to cast a vote. The EC has neither the duty nor the power:

(1) to compel a registered voter to vote on polling day; or

B (2) to ensure that voters such as the applicants are provided with the necessary facilities to enable them to vote at their respective polling stations.

C **[23]** Voters whose names are registered in the electoral roll of a particular polling station are allowed to enter and cast their votes. However, under reg 15(1) of the Elections (Conduct of Elections) Regulations 1981, no person shall be admitted to vote at any polling station except the polling station to which that part of the electoral roll which contains his name has been assigned. In this regard, the applicants have not been prohibited by the D EC from voting at the respective polling stations which contain their names in the electoral roll.

[24] For purposes of completeness, art 119 which regulates the qualifications of electors merits reproduction as follows:

E

Qualifications of electors: 119

(1) Every citizen who:

F (a) has attained the age of twenty-one years on the qualifying date;

(b) is resident in a constituency on such qualifying date or, if not so resident, is an absent voter; and

G (c) is, under the provisions of any law relating to elections, registered in the electoral roll as an elector in the constituency in which he resides on the qualifying date,

is entitled to vote in that constituency in any election to the House of Representatives or the Legislative Assembly unless he is disqualified under clause (3) or under any law relating to offences committed in connection H with elections; but no person shall in the same election vote in more than one constituency.

(2) If a person is in a constituency by reason only of being a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental I defectiveness or of being detained in custody he shall for the purposes of Clause (1) be deemed not to be resident in that constituency.

(3) A person is disqualified for being an elector in any election to the House of Representatives or the Legislative Assembly if —

(a) on the qualifying date he is detained as a person of unsound mind or is serving a sentence of imprisonment; or

(b) having before the qualifying date been convicted in any part of the Commonwealth of an offence and sentenced to death or imprisonment for a term exceeding twelve months, he remains liable on the qualifying date to suffer any punishment for that offence.

(4) In this Article —

(a) 'absent voter' means, in relation to any constituency, any citizen who is registered as an absent voter in respect of that constituency;

(b) 'qualifying date' means the date on which a person applies for registration as an elector in a constituency, or the date on which he applies for the change of his registration as an elector in a different constituency,

in accordance with the provisions of any law relating to elections.

[25] In the South African case of *August & Anor* on which the applicants relied, a sentenced prisoner and a remand prisoner commenced an action against the South African Electoral Commission, seeking declaratory orders that they are entitled to vote and to require the Electoral Commission to make all necessary arrangements to enable them to vote. The Constitutional Court there granted the application.

[26] Learned counsel for the applicants in the instant appeal had not been able to confirm that the relevant provisions of the South African Constitution and election laws under consideration therein are in pari materia with our Federal Constitution and election laws. Be that as it may, it is abundantly clear to me that *August & Anor* is not concerned with the interpretation of laws regulating preventive detainees, as is the case in the instant appeal. I am of the view that the judgment in *August & Anor* must be read and construed in the context of the South African environment. It does not enjoy any binding quality in our courts. That being the case, I hold that it is of no assistance to the applicants herein.

[27] Support for my view is to be found in *Loh Kooi Choon*, in which references were made to the Constitution of India to garner support for the contention that the amendments to our art 4(5) were unconstitutional and invalid. In rejecting that contention, Raja Azlan Shah FJ (now HRH the Sultan of Perak) at pp 188–189 stated succinctly as follows:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and this wording 'can

never be overridden by the extraneous principles of other Constitutions' — see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544 at p 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

Loh Kooi Choon, was followed recently by the Federal Court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1. Abdul Hamid Mohamad PCA (later CJ Malaysia) observed in para [27] thereof that judgments from other jurisdictions, while they are useful comparisons, should not be treated as if they are binding on our courts.

THE RIGHT TO VOTE

[28] The applicants complained that the learned judge had failed to consider that the applicants, being detainees under the Internal Security Act 1960 ('ISA'), were not allowed to leave the detention centre, and the EC had not performed its duty or exercised the power to register them as postal voters, as the EC has a very wide and unlimited discretion to make rules and regulations to enable the applicants to vote.

[29] The EC took the view that the trial judge was correct in concluding that pursuant to art 119, a citizen is entitled to vote only if he is registered in the electoral roll as an elector in the constituency in which he resides on the qualifying date and that he is not being disqualified as an elector at the material time.

[30] In my judgment, the applicants (who are registered voters and who are not convicted prisoners serving sentences) have the constitutional right under art 119 to vote in the constituency where they have registered respectively ie the constituency in which they reside on the qualifying date.

[31] However, the applicants' constitutional right to vote under art 119 allows each of them to vote only in his own particular constituency and at the particular polling station where his name has been registered as an elector.

[32] The applicants' status as ISA detainees and the prohibition against them to leave the detention centre is an entirely different matter which is obviously beyond the EC's jurisdiction, powers, duties and responsibilities. The EC does not and cannot exercise any jurisdiction over the applicants as ISA detainees. The EC is in no position whatsoever to allow or refuse the applicants to leave the detention centre, either for the purpose of casting their votes in the general election or for any other purpose. That jurisdiction is conferred on the Ministry charged with the responsibility for the detention

centre. As that Ministry is not a party herein, the issue relating to the applicants' status as ISA detainees is irrelevant to this appeal.

[33] The EC's powers to make rules pertaining to elections are enshrined in art 113(5). These powers are not unlimited. The EC may make rules thereunder, so far as may be necessary for the purposes of its functions under this article. However, such rules shall have effect subject to federal law. One such federal law is the ISA. That being the case, the rules made by the EC may give effect to the constitutional right of voters but, being subject to federal law, must not override the ISA. That constitutional right to vote is only to be exercised in the respective constituency where he has registered as a voter under art 119. To enact rules in order to allow the applicants to vote eg in the detention centre or at any other place where they were not registered as voters, would contravene art 119.

[34] Further, for the applicants to cast their votes as postal voters, they have to come within the purview of reg 3(1) and (2) of the Elections (Postal Voting) Regulations 2003. Under this regulation, six categories of persons are entitled to vote as postal voters, as stated in the following provisions:

> Persons entitled to vote as postal voters
>
> 3(1) Any person who has registered as a Parliamentary or State elector under the Elections (Registration of Electors) Regulations 2002, and is —
>
> (a) an absent voter;
>
> (b) a person certified by the Election Commission to be an election officer and liable for duties on polling day;
>
> (c) a member of any police force established by any written law in force in Malaysia, other than a member of the Police Volunteer Reserve Force;
>
> (d) a member of any of the public services who on polling day is employed full-time in a post outside Peninsular Malaysia or Sabah or Sarawak;
>
> (e) a member of the Election Commission appointed under Article 114 of the Federal Constitution; or
>
> (f) a member of any category of persons designated as postal voters by the Election Commission from time to time by notification in the Gazette,
>
> shall, on receipt of a postal ballot paper, be entitled to vote as a postal voter at an election in accordance with these Regulations.
>
> (2) A person referred to in paragraphs (1) (b), (d), (e) and (f) desiring to vote by post shall apply to do so by using Form 1 in the Schedule.

[35] As ISA detainees, the applicants may, where appropriate, invoke reg 3(2) above, and apply to vote by post, by using Form 1 in the Schedule thereto. However, the applicants did not invoke reg 3(2). As alluded to above, they have instead written letters dated 15 and 17 March 2004 to the EC to treat them as postal voters. These letters were written well after 13 March 2004 which was the nomination day for the general election. That is significant. Regulation 14A of the Elections (Conduct of Elections) Regulations 1981 provides that the electoral rolls which are submitted to the candidates on the day of nomination shall be the authoritative texts of the electoral rolls which will be used by the returning officer and the presiding officer of a polling station on polling day. Regulation 14A therefore requires the authoritative texts of the electoral rolls to be submitted to the candidates on the day of nomination ie 13 March 2004. As the applications' letters dated 15 and 17 March 2004 were written to the EC well after the nomination day ie 13 March 2004, it is abundantly plain that the applicants cannot legally be included in the electoral rolls in order to become postal voters for the general election. The applicants remain as walk-in voters who have to be personally present at the respective constituencies to cast their vote. However, their inability to cast their votes as walk-in voters was not caused by the act or omission of the EC.

[36] In the circumstances, the applicants' complaint of the violation of their rights to vote as walk-in or postal voters is wholly without merits.

ARTICLE 8

[37] The final issue raised for the applicants is based on the allegation that as there are no rules or regulations to enable them to vote either as regular walk-in or postal voters under art 119, there was discrimination against them, in violation of art 8.

[38] The EC denied any discrimination against the applicants' right to vote.

[39] In my judgment, the short answer is to be found in art 113(5), pursuant to which the EC has through the election laws made it possible for the applicants as registered voters to cast their votes under art 119 in the respective constituency where they have registered as voters. The EC had never deprived them of the right to vote, nor was there any discrimination against them. Discrimination may well arise if eg other ISA detainees were accorded facilities to cast their votes and the applicants were denied or refused such facilities. However, that was not the case here, as all ISA detainees by

way of reasonable classification were treated equally in so far as the exercise of their constitutional rights under art 119 is concerned. There is no discrimination whatsoever.

[40] The applicants' detention in the detention centre pursuant to ISA has nothing to do with the EC. The applicants' grievances, if any, should have been ventilated by them in the proper forum ie the Ministry concerned. As alluded to above, that is certainly not relevant to these proceedings for judicial review against the EC.

[41] The learned judge had correctly stated in para 18 of his judgment that it is not the EC's responsibility to ensure that all registered voters cast their votes on polling day, as voting is not compulsory in Malaysia.

CONCLUSION

[42] On the foregoing grounds, I hold that the learned judge has correctly dismissed the applicants' application. Their appeal, being devoid of merits, is dismissed with costs. I affirm the orders made in the court below. Deposits to the EC on account of taxed costs.

Zainun Ali JCA (delivering the dissenting judgment):

[43] It must be said at the outset that this appeal has intriguing issues not least those touching on the meaning and purport of a citizen's rights of enfranchisement, within the context of constitutional and human rights issues and preventive detention laws.

[44] I have taken some time to mull over this appeal for it has reaches into the realm of constitutional law as well as judicial review.

FACTS OF CASE

[45] The 22 appellants are Malaysian citizens and are registered voters in their various constituencies. Under art 119 of the Federal Constitution ('FC'), they are entitled to vote at the polling station where their names have been registered as an elector under the respective constituency.

[46] In this case, all the 22 appellants (as per Appendix A) were detained under the order of the Minister of Home Affairs under s 8 of the Internal Security Act 1960 ('ISA'). The appellants were detained at the Tempat Tahanan Perlindungan Taiping, Batu 4, Kamunting, 34009 Taiping, Perak Darul Ridzuan on various dates after their arrest.

[47] On 4 March 2004, pursuant to art 55(2) of the FC, the Legislative State Assemblies (except Sarawak) were dissolved, as was Parliament by the King, pursuant to art 55(4) of the FC which reads:

> Whenever Parliament is dissolved a general election shall be held within sixty days from the date of the dissolution and Parliament shall be summoned to meet on a date not later than one hundred and twenty days from that date.

[48] In accordance with that art, the 11th general elections were to be held within 60 days from 4 March 2004. The respondent then issued a notice, which was gazetted on 7 March, fixing 13 March 2004 as the nomination day and 21 March 2004 as the polling day respectively.

[49] The appellants wanted to cast their votes during the 11th general election. None of the appellants are voters registered in Kamunting but are registered in different constituencies in the country. They then instructed *Gerakan Mansuhkan ISA* ('GMI') consisting of not less than 83 organisations to write to the respondent on 15 March 2004 and 17 March 2004 to inform them of their intention to exercise their right to vote.

[50] These letters clearly evinced their intention to vote. These letters also appealed to the respondent to facilitate the casting of their votes during the said elections. However no response came from the respondent until 18 March 2004, when the chairman of the respondent, Tan Sri Abd Rashid Abdul Rahman on 18 March 2004 gave a press statement in a Chinese newspaper *Sin Chew Jit Poh* that as detainees under the ISA, the appellants will not be able to vote.

[51] Despite this, the appellants wrote yet another letter dated 20 March 2004 to the respondent containing the same request. This letter too received a negative response from the respondent. *The respondent's decision was that they were under no duty to make provisions for the appellants to cast their votes on 21 March 2004.* (Emphasis added.)

[52] According to the appellant, this decision amounted to denial of their right to vote pursuant to art 119 of the FC; that the whole process undertaken by them and the respondent, culminating in the respondent's decision had adversely affected them in the exercise of their constitutional right; that the impugned decision by the respondent manifested an action which is procedurally unfair and substantively wrong. Hence the appellant's application before us for judicial review (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, *Hong Leong*

Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 at p 55; *Judicial Remedies in Public Law* (pp 4–44) at pp 136 and (pp 4–66) 114).

[53] The respondent is a commission set up under art 114 of the FC to conduct elections. The appellant submitted that the duties and responsibilities of the respondent have been specified under art 113 of the FC and s 5 of the Elections Act. The respondent is a public body which under art 113:

(1) performs functions provided under art 114 of the FC:

a to conduct elections to the House of Representatives and the Legislative Assemblies of the States (art 113(1) of the FC);

b to prepare and revise electoral rolls for the elections (art 113(1) of the FC); and

c to make rules as may be necessary for the purposes of its functions under art 113, 113(5) of the FC,

(2) shall exercise control and supervision over the conduct of elections and the registration of electors on the electoral rolls (s 5(1)(a) of the Elections Act 1958 ('Ele A'));

(3) shall enforce on the part of all election officers fairness, impartiality and compliance with Part VIII of the FC and Ele A and regulations made thereunder (s 5(1)(a) of the Ele A);

(4) shall have powers to issue to election officers such directions as may be deemed necessary by the respondent to ensure effective execution of Part VIII of the FC and Ele A and regulations made thereunder (s 5(1)(b) of the Ele A);

(5) shall execute and perform all other powers and duties which are conferred or imposed upon it by the Ele A and regulations made thereunder (s 5(d) of the Ele A);

(6) has the power, with the approval of the Yang di-Pertuan Agong, to make regulations for the registration of electors and for all matters incidental thereto (s 5 of the Ele A); and

(7) has the power, with the approval of the Yang di-Pertuan Agong, to make regulations for the conduct of elections to the Dewan Rakyat and the Legislative Assemblies, and for all matters incidental thereto (s 16 of the Ele A).

[54] Article 113 of the FC is read with s 5 of the Elections Act 1958 and reads:

A Section 5(1) The Election Commission shall:

(a) exercise *control* and *supervision* over the *conduct* of elections and the registration of electors on the electoral rolls and should enforce on the part of all election officers fairness, impartiality and compliance with Part VIII of the Constitution and this Act and any regulations made thereunder; (Emphasis added.)

B

[55] The appellants took the position that the powers of the respondent in art 119, related laws, rules and regulations are to be exercised in accordance with the principles governing public administrative bodies. That the decision above given by the respondent meant that the appellants are denied or prohibited their right to vote, pursuant to art 119 of the FC.

C

[56] It is also the appellant's case that the respondent's decision which is impugned, is reviewable since the process leading to the decision is subject to scrutiny on the grounds of procedural impropriety, illegality and proportionality (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145).

D

E **[57]** The question is whether given the circumstances, the respondent's action/inaction in not making provisions for the appellants to vote is discriminatory and arbitrary, making its decision both, procedurally unfair and substantively wrong.

F **[58]** To so determine, it would be crucial to examine the decision of the respondent reflected in the affidavit of the chairman of the election commission ie Tan Sri Rashid, affirmed on 10 August 2005 which, inter alia, stated that:

G Saya, Tan Sri Ab Rashid bin Abd Rahman (No K/P: 421231–03–5143), seorang warganegara Malaysia yang cukup umur dan beralamat di Suruhanjaya Pilihan Raya Malaysia, Aras 4–5, Blok C7, Parcel C, Pusat Pentadbiran Kerajaan Malaysia, 62690 PUTRAJAYA dengan sesungguhnya berikrar dan menyatakan seperti berikut:

H (1) Saya adalah Pengerusi, Suruhanjaya Pilihan Raya Malaysia ('SPR'), Responden dalam tindakan ini semenjak 17 November 2000.

(2) ...

I (3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) Justeru itu, memandangkan bahawa pemohon-pemohon bukan Pengundi Berdaftar bagi kawasan Kamunting, Taiping, mereka tidak berhak mengundi di bahagian pilihanraya di Kamunting. *Mereka hanya mempunyai hak untuk membuang undi di tempat mengundi yang telah ditetapkan bagi bahagian (constituency) pilihan raya yang mana mereka telah didaftarkan, seperti dalam carta di dalam perenggan 7 di atas*.

(10) Adalah menjadi tanggungjawab pengundi berdaftar itu sendiri untuk hadir pada hari mengundi untuk membuang undi di tempat mengundi yang telah ditetapkan bagi bahagian pilihan raya yang dia telah didaftarkan. Tugas SPR adalah untuk menjalankan kawalan dan penyeliaan ke atas perjalanan pilihan raya dan pendaftaran pemilih-pemilih dalam daftar-daftar pemilih seperti yang diperuntukan di bawah Perlembagaan Persekutuan dan Akta Pilihan Raya 1958.

(11) Saya menegaskan di sini bahawa tidak ada peruntukan dalam undang-undang yang memerlukan SPR menjadikan sebagai tugas atau kewajipannya untuk memastikan bahawa setiap pengundi yang berdaftar akan membuang undi pada hari mengundi. Justeru itu, sekiranya pengundi yang berdaftar di Kuching, Sarawak telah berpindah ke Kuala Lumpur, maka adalah menjadi tanggungjawab pengundi tersebut untuk balik ke Kuching, Sarawak untuk membuang undi pada hari mengundi. Ini adalah atas tanggungan sendiri dan bukannya SPR.

(12) Justeru itu, adalah tidak benar pertuduhan pemohon-pemohon bahawa SPR telah 'tidak memboleh dan membenarkan' mereka membuang undi pada hari mengundi. Pemohon-pemohon merupakan orang-orang dalam tahanan dan pihak SPR tidak mempunyai apa-apa kuasa untuk mengeluarkan mereka dari tahanan tersebut supaya mereka dapat mengundi di tempat mereka mendaftar sebagai pengundi.

(13) SPR juga tidak mempunyai sebarang kuasa untuk mewartakan Pusat Tahanan Kamunting sebagai tempat-tempat mengundi bagi membolehkan pemohon-pemohon mengundi. Ini adalah kerana undang-undang yang sedia ada telah memperuntukkan bahwa tempat mengundi hendaklah ditempatkan di dalam daerah mengundi berkaitan. Tempat-tempat tersebut hendaklah diwartakan bersama daerah-daerah mengundi yang berkenaan. Justeru itu, sekiranya SPR membenarkan pemohon-pemohon mengundi di Kamunting, iaitu tempat dan daerah mengundi yang lain dari

A tempat dan daerah mengundi di mana mereka telah didaftarkan sebagai pengundi, ini adalah salah di sisi undang-undang.

(14) Saya juga menegaskan di sini bahawa pemohon-pemohon adalah pengundi biasa dan bukan pengundi pos. Sekiranya
B pemohon-pemohon mahu menjadi pengundi pos di bawah subperaturan 3(1)(f) Peraturan-Peraturan Pilihanraya (Pengundian Pos) 2003, mereka hendaklah memohon kepada SPR sebagai anggota di bawah kategori orang yang ditetapkan sebagai pengundi pos oleh SPR melalui pemberitahuan dalam Warta. Mereka tidak layak
C memohon di bawah kategori 3(1)(a) hingga (e). Hanya selepas permohonan tersebut diluluskan dan diwartakan, barulah mereka menjadi pengundi pos di bawah kategori subperaturan 3(1)(f). Dalam kes ini pemohon-pemohon tidak pernah memohon untuk menjadi pengundi pos. *Justeru itu, mereka tiada hak untuk mengundi*
D *sebagai pengundi pos.*

(15) Sekiranya pemohon-pemohon atau Gerakan Mansuhkan ISA ('GMI') mengatakan bahawa surat dari GMI secara tersirat meminta SPR untuk mewartakan mereka sebagai pengundi pos, surat tersebut
E adalah terlalu lewat untuk diambil tindakan memandangkan *Daftar Pemilih sudahpun dicetak dan telahpun diedar kepada calon pada 13 Mac 2004*, iaitu dua hari sebelum surat pertama yang dihantar oleh GMI, yang mana SPR telah terima pada 18 Mac 2004.

(16) Saya menegaskan juga bahawa SPR tidak mempunyai kuasa untuk
F membekalkan mana-mana kertas undi pos kepada Pemohon-Pemohon kerana Pemohon-Pemohon bukanlah Pengundi Pos.

(17) Merujuk kepada surat daripada GMI, saya menyatakan tiada jawapan
G diberikan kerana SPR sedang *sibuk* membuat persiapan untuk pilihanraya. Lagipun permintaan GMI supaya kertas-kertas undi dibekalkan kepada tahanan-tahanan ISA tersebut tidak dapat dipenuhi kerana kertas-kertas undi hanya boleh dibekalkan menurut peruntukan undang-undang yang sedia ada.

H (18) Mengenai laporan akhbar yang telah dieksibitkan pada kedua-dua afidavit Yazid dan afidavit Yap, saya telah dinasihatkan oleh peguam kanan persekutuan dan sesungguhnya percaya bahawa laporan akhbar adalah 'hearsay evidence' dan tidak boleh digunakan dalam tindakan ini.

I (18.1) Lagipun laporan tersebut adalah tidak tepat mengenai apa yang saya telah nyatakan/maksudkan dalam sidang akhbar tersebut. Saya tidak maksudkan bahawa SPR mempunyai kuasa mutlak untuk memutuskan hak-hak mengundi tahanan-tahanan di bawah

Akta Keselamatan Dalam Negeri 1960. Yang saya maksudkan adalah hak-hak untuk mengundi telah diperuntukkan dalam Perlembagaan Persekutuan dan Undang-undang Pilihanraya yang sedia ada.

(18.2) Saya juga menyatakan/maksudkan dalam sidang akhbar tersebut bahawa adalah terlalu lewat bagi GMI dan Pemohon-Pemohon untuk membuat permohonan supaya mereka dimasukkan dalam perenggan 3(1)(f) Peraturan-Peraturan Pilihan Raya (Pengundian Pos) 2003, iaitu sebagai anggota kategori orang yang ditetapkan sebagai pengundi pos oleh SPR melalui pemberitahuan dalam warta. Daftar Pemilih sudahpun dicetak dan telahpun diedar kepada calon pada 13 March 2004, iaitu dua hari sebelum surat pertama yang dihantar oleh GMI. Setiap kategori pengundi pos mempunyai nombor kod tersendiri untuk menunjukkan bahawa mereka ialah pengundi pos Daftar Pemilih.

(18.3) Adalah ditegaskan lagi bahawa pihak SPR tidak pernah menerima apa-apa permohonan daripada Pemohon-Pemohon mengenai hasrat mereka untuk ditetapkan sebagai pengundi pos.

(18.4) Laporan akhbar tersebut juga tidak boleh dijadikan landasan untuk Pemohon-Pemohon untuk menuduh Responden menghalang Pemohon-Pemohon daripada menjalankan hak mereka untuk mengundi. Ini adalah kerana SPR hanya menjalankan tugas menurut Perlembagaan Persekutuan dan peruntukan undang-undang yang sedia ada mengenai pilihanraya.

(19) ...

(20) ...

(21) Adalah dinafikan bahawa SPR telah bertindak secara diskriminatori, menindas, prejudis atau secara arbitrary. SPR telah bertindak berpandukan dan mematuhi undang-undang yang sedia ada. Undang-undang telah memperuntukkan bahawa Pemohon-Pemohon, sebagai pengundi biasa, hanya boleh mengundi di tempat dan bahagian (constituency) di mana mereka telah didaftarkan sebagai pengundi.

(22) Oleh yang demikian, saya telah dinasihatkan oleh peguam kanan persekutuan dan sesungguhnya percaya bahawa SPR tidak pernah menafikan hak-hak Pemohon-Pemohon di bawah Perlembagaan Persekutuan.

(23) Saya telah dinasihatkan oleh Peguam Kanan Persekutuan dan sesungguhnya percaya bahawa Pemohon-Pemohon telah gagal untuk membuktikan bahawa SPR telah mencabuli hak-hak Pemohon-Pemohon. Oleh itu mereka tiada hak keatas sebarang

A gantirugi. Lagipun Pemohon-Pemohon telah gagal untuk membuktikan kerugian yang kononnya mereka telah alami.

(24) ...

(25) ...

B

[59] The appellant then applied for and obtained leave from the High Court for judicial review of the respondent's decision.

C **[60]** The appellants' application before the High Court is for the following orders:

(a) a declaration that the fundamental rights of the appellants to vote under art 119 of the Federal Constitution in the 11th general elections has been violated by the respondent;

D

(b) a declaration that the appellants' fundamental right to freedom of speech and expression under art 10(1)(a) of the FC in the 11th general elections has been violated by the respondent;

E (c) a declaration that the appellants' fundamental right to equal protection under the law under art 8 of the FC;

(d) an order of certiorari to quash the decision and action of the respondent for their refusal, denial and neglect to enable and to allow the appellants to vote in the 11th general elections; and

F (e) for punitive, aggravated and exemplary damages.

[61] Basically, the appellants' case is that they are Malaysian citizens who have not been charged with any offence, nor convicted of any crime. Neither are they serving any sentence of imprisonment, nor are they undergoing punishment for any offence or crime. In short, they do not come within the category of persons prohibited from exercising their constitutional right of enfranchisement under art 119(3) of the FC.

G

H **[62]** Article 119 of the FC reads as follows:

Article 119 Qualifications of Electors

(1) Every citizen who:

I (a) has attained the age of twenty-one years on the qualifying date;

(b) is resident in a constituency on such qualifying date or, if not so resident, is an absent voter; and

(c) is, under the provisions of any law relating to elections, registered in the electoral roll as an elector in the constituency in which he resides on the qualifying date, is entitled to vote in that constituency in any election to the House of Representatives or the Legislative Assembly unless he is disqualified under Clause (3) or under any law relating to offences committed in connection with elections; but no person shall in the same election vote in more than one constituency.

(2) If a person is in a constituency by reason only of being a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or of being detained in custody he shall for the purposes of Clause (1) be deemed not to be resident in that constituency.

(3) A person is disqualified from being an elector in any election to the House of Representatives or the Legislative Assembly if:

(a) on the qualifying date he is detained as a person of *unsound mind* or is serving a sentence of imprisonment; or

(b) having before the qualifying date been *convicted* in any part of the Commonwealth of an offence and sentenced to death or imprisonment for a term exceeding twelve months, he remains liable on the qualifying date to suffer any punishment for that offence.

(4) In this Article:

(a) 'absent voter' means, in relation to any constituency, any citizen who is registered as an absent voter in respect of that constituency;

(b) 'qualifying date' means the date on which a person applies for registration as an elector in a constituency, or the date on which he applies for the change of his registration as an elector in a different constituency, in accordance with the provisions of any law relating to elections.

[63] A careful reading of the provisions above would show that the right to vote (save for the exception in art 119(3)) is couched in unconditional terms.

[64] And since the appellants claim that they do not come within the category of persons disqualified from being an elector under art 119(3) of the FC or by any other law is undisputed, their right to vote is intact. The respondent has not rebutted this and so there is no dispute in this regard (see also regs 5 and 14 of the Elections (Conduct of Elections) Regulations 1981).

[65] The position taken by the appellants is that *the respondent, by virtue of its duties and functions and its position in the entire democratic process under the Federal Constitution, is under a duty to ensure that the constitutional rights of electors to vote granted under art 119 of the FC is preserved and protected.* The denial of that right by the respondent amounted to a breach of its duty, rendering its decision procedurally unfair and substantively wrong.

THE RESPONDENT'S CASE

[66] The respondent's affidavit was affirmed by the chairman Tan Sri Rashid Abdul Rahman on 10 August 2005. The salient facts in the affidavits are that:

(1) under art 119 of the FC, the appellant being registered voters are entitled to vote for the particular constituency and at the particular polling station where his name has been registered as an elector;

(2) that none of the applicants are voters registered in Kamunting but are registered in different constituencies in the country;

(3) the appellants are all regular (walk-in) voters and are not postal voters (it is their duty to go to the respective polling station personally to vote; the appellants have never applied to be nor have they been postal voters);

(4) the duties of the EC are to conduct the election and to prepare the electoral rolls; it is not the duty of EC to ensure that every registered voter will vote on polling day; and

(5) the EC did not deny nor violate the appellants' constitutional rights under the FC.

[67] Thus the issues in the application before the High Court were:

(a) whether the appellants' have a constitutional right to vote in the 2004 Election;

(b) whether such rights have been violated by the respondent;

(c) whether the appellants' rights to freedom of speech and expression under art 10(1)(a) of the Federal Constitution have been violated by the respondent; and

(d) whether the appellants' entitlement to the equal protection of the law under art 8 of the FC have been violated by the respondent.

[68] The appellants' application for judicial review failed before the High Court. It is instructive to consider the High Court decision, the essence of which is:

… Thus the crucial issue was whether there is a duty on the Commission to facilitate the casting of votes by the applicants *by bringing them to the respective constituencies where the applicants were registered as electors. To me, there is no such duty cast upon the Commission.* This was because it is not the responsibility of the Commission to ensure that all electors would vote on polling day. Voting is not compulsory in Malaysia. It is left to the individual registered elector to go to the polling station of the constituency where his name has been registered as an elector. For example, if a person is in Kuala Lumpur in a polling day, but he is registered as a elector in constituency of Kota Bharu, Kelantan, it is up to him to make the necessary arrangement to go back to Kota Bharu to exercise his right to vote. *It is not the duty of the Commission to provide transportation for him to return to Kota Bharu, Kelantan to vote on the polling day. Similarly it is not the duty of the Commission to transport the applicants to the respective constituencies to enable them to vote on polling day.*

[69] It is against this decision and the position taken by the learned High Court judge that the appellants came before us.

GROUND (1) MEMORANDUM OF APPEAL

[70] The main issues raised by the appellant in ground (1) of their memorandum of appeal are:

(1) that the learned trial judge erred in law when he failed to give a generous interpretation to arts 8, 10(1)(a) and 119 of the Federal Constitution in favour of the appellant;

(2) that the learned trial judge erred in law when he failed to decide that Part VIII, arts 113 and 114 of the Federal Constitution read with the Elections Act 1958 impose a duty on the respondent to ensure that all Malaysian citizens, including the detainees under the preventive detention laws who are registered voters cast their votes, through rules and regulations, as guaranteed under art 119 of the FC; and

(3) that the learned trial judge erred in law when he failed to decide that the respondent had breached that duty.

[71] The crux of the respondent's position is that nowhere is it expressed either in the FC and laws such as the Elections Act 1958, nor in the regulations such as the Elections (Conduct of Elections) Regulations 1981 that the Election Commission is to ensure that every registered voter will vote on polling day.

[72] The respondent went on to say that it is not its duty to ensure that the appellants herein are provided with the necessary facilities to enable them to vote at their respective polling stations. The respondent said that to impose

such a requirement on it would *impose on it a heavy burden* since it is already running the national election for the whole country. (Emphasis added.)

[73] The respondent took the position that under the Elections (Conduct of Elections) Regulations 1981, it can prohibit any person from voting at a polling station unless his name is registered in the electoral roll at the specified station. Thus, unless it is shown and proven that it had clearly prohibited the appellants from voting at the polling station containing their names in the electoral roll, it could not then be said that there is any violation of the appellants' constitutional rights to vote under art 119 of the FC.

[74] The respondent also contended that it has no power nor jurisdiction over the detention facilities.

[75] Learned counsel for the appellants, Encik Edmund Bon submitted that the respondent had never put its mind to, nor even considered any provision for detainees to vote. It had not enacted any provision for detainees under preventive detention to exercise their rights to vote. Encik Bon went on to say that the respondent's failure to make such provisions to facilitate the appellant's right to vote in the 2004 election amounted to a breach of its duty, resulting in the appellant's constitutional rights of voting being infringed. More importantly, he said that the respondent's impugned decision is arbitrary and clearly reviewable on grounds of procedural unfairness and substantive wrongdoing where issues of procedural impropriety, illegality, irrationality and proportionality weigh heavily.

[76] Before I decide on the points raised by both parties, it is instructive to address the threshold position currently in place in our jurisprudence with regard to judicial review of administrative action.

[77] The impugned decision of the respondent is an administrative action. The respondent is a public body established under the Federal Constitution. It is well entrenched in our law that the public decision maker should ensure that procedural fairness amongst others, is meted out when arriving at its decision.

[78] Much water has gone under the bridge since the application of the 'Wednesbury unreasonableness' principle (case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680) at least in the Malaysian judicial context. In the past, courts in judicial review, refrained from going into the substance or the factual matrix of the case, on the principle that it should confine itself merely to 'the correctness of the decision-making process' (per Lord Brightman in *Chief Constable of the North Wales Police v*

Evans [1982] 3 All ER 141). It is the manner in which the decision was made, that is crucial in judicial reviews, not the decision itself.

[79] However, later decisions have shown that our courts are not diffident towards a more robust and expansive approach to the remedy of judicial review. Perhaps the courts were irked by the traditional bar (in such cases) to enter into the merits of the case and they then substituted the court's opinion in place of that of the decision makers because in their view, only then would justice be served.

[80] Our court's unhesitant approach in departing from the traditional English common law concept of judicial review manifested itself in the locus classicus of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. This landmark decision of the Federal Court transformed the entire learning on the subject. The conceptual distinction of supervisory and appellate jurisdiction if any, are put aside for the notion of 'where justice of the case so demand' which allowed the court to go into the merits of the matter. I am aware of the various concerns expressed regarding the effect left behind by the decision in *Rama Chandran* since the message of the *Rama Chandran* approach is that courts are not to be restrained by the distinction between legality and merits review from exercising judicial discretion when justice and fairness call for an intervention. The inquiry into whether the decision making process (Election Commission in this appeal) is procedurally fair and reasonable goes to a *reassessment of the merits of the award*, which then blurs the distinction between review and appeal. But obviously the approach now is that the distinction no longer holds. In *Petroliam Nasional Bhd v Nik Ramli bin Nik Hassan* [2000] 2 MLJ 272, Steve Shim CJ as he then was, observed that:

> … the progressive views expressed in *Rama Chandran* have been accepted and adopted by the Malaysian judiciary at the highest level. Although these view are expressed in the context of decisions from the Industrial Court, they are also applicable, in my view, to decisions of other statutory tribunals and bodies.

[81] I made reference to the above issue of the court's power in judicial review as to make clear the position taken by parties and the reliefs prayed for in the instant appeal.

[82] Looking at the appellant's application for judicial review where they sought relief in declarations, certiorari and consequential relief in damages, it is instructive to see what the application really entails.

[83] Certiorari is essentially the process whereby a decision or determination of an inferior court or tribunal or administrative body is

challenged in a superior court with a view to quashing it for any number of reasons. By obtaining orders in the form of certiorari, the state could ensure that public authorities carry out their duties. On the other hand, declarations, or declaratory judgments essentially state the rights or legal position of the parties as they stand, without changing them in any way, though it may be supplemented by other remedies in some cases.

[84] By enabling a party to discover what his legal position is, it opens the way to the use of other remedies for giving effect to it, if that should be necessary.

[85] Like certiorari, a declaration is a discretionary remedy.

[86] The question now is whether the impugned decision of the Election Commission should be quashed for being unreasonable in the *Wednesbury* sense or under any of the ground of judicial review as had been permutated through case laws over the years.

[87] The development of the doctrines of procedural and substantive fairness by our courts reflect the vigour displayed in the court's approach in dealing with cases involving fundamental rights.

[88] In fact the decision in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 AMR 167 bears testimony to this.

[89] The essence of the issues raised by the appellants, in ground (1) of their memorandum of appeal are whether:

(i) there is a duty or an obligation on the respondent to facilitate (eg by way of legislation or regulations) the casting of votes by detainees held under preventive detention laws?

(ii) on the facts of this application, the regulations with regard to postal voting, absent voters and alternative/change to the electoral roll (ie from a present to postal voter) made it impossible for the appellants to cast their votes at all, rendering their right to vote illusory and ineffective; and

(iii) failing to provide regulations in law to facilitate the casting of votes by detainees held under preventive detention laws, amounted to discriminatory and arbitrary practices in contravention of arts 8, 10(1)(a) and 119 of the FC.

[90] What is discernible is that the appellants submit that the relevant constitutional and statutory regime in place imposes a *duty on the respondent to ensure that all eligible electors could (as opposed to would) cast their votes on polling day.* (Emphasis added.)

[91] I have deliberately recast the points of issue raised above, in the light of the pleadings and submissions made by parties. At some point, it can be gleaned that both the approach of the respondent and the learned trial judge seemed to be at odds with that of the appellants and more importantly, with the pith and substance of the fundamental right in question.

[92] This is seen in the learned judge's finding where he said:

> The crucial issue is whether there is a duty on the Commission to facilitate the casting of votes by the applicants by *bringing them* to the respective constituencies: to me there is no such duty. This is because it is not the responsibility of the Commission to ensure that all electors would vote on polling day. Voting is not compulsory in Malaysia. It is left to the individual elector to go to the polling station of the constituency where his name has been registered as an elector …

[93] This sentiment supported that of the submission of learned senior federal counsel, Puan Azizah Nawawi, who earlier stated, inter alia, that '*it is not the duty of the respondent to provide transportation to enable a registered voter to vote on polling day*. Thus it is not the duty of the respondent to ensure that the appellant herein are provided with the necessary facilities to enable them to vote at their respective polling station …

[94] For my part, I am unable to comprehend why the respondent sets such great store by the notion that it is *not their duty* to ensure that all electors *would* vote on polling day. Of course it is not. Why in the world would such an exacting duty fall upon the respondent? The respondent is not the 'national nanny' as it were, making sure that 'little Lord Fauntleroy' goes to the polls to cast his vote. In this context, the 'nanny's' duty is merely to provide the facilities in the nursery. It is up to His Lordship whether or not to utilise them. In much the same way, the respondent's duty here is to merely provide the necessary facilities for all eligible electors to vote. It is up to the electorate to exercise their rights or otherwise. There is no compulsion for the electorate to vote, inasmuch as there is no punishment if they do not. However, the issue raised by the appellants is that, it is not the physical inability or difficulty confronting them in their intention to exercise their voting right, but the unavailability of such facility to do so.

A **[95]** The appellants are aware that they are detainees. They are also aware that it may be well nigh impossible to go back to their respective constituencies to vote, whilst in detention.

B **[96]** The appellants are certainly under no illusion that the respondent has any power to allow them to leave the detention centre to cast their vote since that power may rightly rest with the relevant Ministry.

C **[97]** But what concerns the appellants is the respondent's failure to exercise its powers to facilitate their right, to cast their vote. The powers reposed in the respondent in art 113(5) are crystal clear.

D **[98]** The respondent can make rules giving effect to the constitutional right of voters, subject to the provisions of federal law. The failure of the respondent in making any rule to effectuate the detainees' intention to vote or providing any facility (such as providing voting by proxy or by exemption of the obligation to vote at the constituency they were registered in posting arrangement) meant one thing: that the appellants are denuded of their fundamental right to vote.

E

[99] Instead, a decision was made by the respondent on the simple ground that they were under no duty to make provisions for the appellants to cast their votes on 21 March 2004.

F **[100]** The appellants contend that this amounted to a prohibition and/or prevention and/or denial of the appellants' rights to vote pursuant to art 119 of the FC. The process which culminated in the decision and substance of that decision had affected the appellants, which the appellants contended, is subject to judicial review (see *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481).

G

[101] It is now time to scrutinise the constitutional provisions of the right to vote, its attendant rules and regulations and related laws affecting the appellants in this appeal.

H

[102] Article 119 of the FC gives qualified citizens the right to vote. This constitutional right is couched in unconditional terms. There is no qualification, save those expressly stated in art 119(3) of the FC.

I

[103] As the appellants are being detained by orders of the Minister under s 8 of the Internal Security Act 1960 ('ISA') directing that they be held at Tempat Tahanan Perlindungan Kamunting, and they have not been charged with any offence nor convicted of any crime nor are they serving

imprisonment or undergoing punishment envisaged under art 119(3), they contend that they are therefore entitled to vote under art 119 of the FC.

[104] The appellants contend that they are not absent voters as defined in art 119(4)(a) of the FC. Even under reg 2 of the Elections (Registration of Electors) Regulations 2002, the appellants as preventive detainees are not included.

[105] The appellants are also not postal voters, much as the respondent suggested they could have been, had they been minded to apply.

[106] Notwithstanding this, reg 3(2) Elections (Postal Voting) Regulations 2003 is permissive and not mandatory.

[107] It is a fact that the appellants *did not* make any formal application to be registered as postal voters under reg 3(1)(f) of the Elections (Postal Voting) Regulations 2003. But the learned judge indicated that they could apply to be postal voters under sub-reg (f).

[108] In not making a formal application as the learned judge indicated above, His Lordship observed that:

> … clearly from the above, the appellants are not qualified to be postal voters under sub para (1)–(e).

[109] His Lordship took the view that:

> … since the applicants are not postal voters, there was no violation of their rights when the Commission did not provide them with the postal ballot papers ...

[110] In any case, the appellants as detainees held under the ISA are not qualified to apply or be categorised as postal voters under reg 3(1)(f) of the Elections (Postal Voting) Regulations 2003. This is because the application in Form 1 and the accompanying certificate show that detainees do not fall within the category of persons who may apply or which the respondent may verify as being eligible for postal voting. The appellants are therefore excluded from the category of citizens who are permitted to vote by post. So what exactly did the respondent and the trial judge have in mind, making reference to postal votes vis-à-vis the appellants? Clearly they seem to be unclear as to the legal position.

[111] The question is whether this exclusion from voting could manifest an infringement of the appellant's rights to equal protection of the law under art 8 of the FC, which is not ousted by art 149 of the FC.

[112] Secondly, a significant point raised was with regard to art 119(2) of the FC which states that persons *'detained in custody'* in a certain *constituency shall 'be deemed not to be resident in that constituency*'.

[113] Taking this and reading it with art 119(1) and coupled with the fact that the appellants are not within the category of persons disentitled to vote, my view is that this makes for a strong case that cl (2) guarantees that persons detained in custody are *still* afforded the opportunity to exercise their rights to vote while in detention.

[114] Taking it a step further, it implies that some kind of arrangement need be made for them. This view is strengthened by the existing provisions for *prisoners* to vote either at the respective prisons or through other means or by exempting them from the obligation to vote at the constituency they were registered in. Article 113(5), coupled with ss 15 and 16 of the Elections Act 1958 give such power to the respondent. The relevance of this fact cannot be understated.

[115] In this connection, it is pointedly obvious that the Election Commission has powers under the Elections Act 1958 to make alternative arrangements and provide facilities for electors by enacting rules and regulations for electors who for some reason are unable to vote in their respective constituencies as indicated in the case of prisoners above. And again, in the case of 'absent voters' in reg 2 of the Elections (Registration of Electors) Regulations 2002, this power is self-evident. The 'absent voters' such as serving members of the naval, military or air force of Malaysia and their spouse, those in the public service on duty outside the boundaries of West and East Malaysia, students studying in universities outside the boundaries of West and East Malaysia are *all* qualified to be registered as electors and are accorded the right to vote.

[116] It is in this context that the appellants raised the issue of their fundamental right to vote being infringed, when no arrangement or facility whatsoever had been made by the respondent even after several letters to that effect had been served on the respondent.

[117] At the expense of tedious repetition, the 'special' arrangement such as that given to absent and postal voters as spelt out in the Regulations made by the respondent pursuant to the powers given by the Elections Act 1958 as illustrated above, can only mean one thing. That the respondent is equipped with various powers and means in the execution of its duty in 'conducting' the elections and that it is not impaired in its execution thereof.

[118] The respondent, having such powers, substantive or enabling as the case may be, can ensure that the fundamental rights of electors to vote are exercised and preserved to enhance the democratic process.

[119] The grouse of the appellants is that the respondent had never considered and/or enacted provisions in law for the appellant who are detained under the preventive detention law to exercise their right to vote. In short, they said that the respondent, whose duty is to ensure that the right of citizen to vote in a fair and impartial manner, have fallen short of that duty. In fact the respondent in not making any arrangement or creating any condition for the appellants to exercise that right, have breached that duty.

[120] On the respondent's part, the submission simply put is this: 'that art 119 grants the appellants' constitutional right to *vote* only for the particular constituency and only at the particular polling station where his name had been registered as a voter; that the rules to be enacted are only for the purposes of the respondent's function under art 113 and this is subject to federal laws; that whatever laws *the respondent may enact cannot contravene the ISA 1960*. Further, the rules enacted must give effect to art 119 ie that the constitutional right of a voter can only be exercised in the respective constituency where he had registered as a voter.

[121] Taking one point at a time, I find the respondent's approach above to be unusually confining and restrictive in the light of its powers and duties. By emphasising that the appellants must, by all means cast their votes at no other constituency than the ones they were registered in, the respondent appeared unmindful of the latitude they themselves possess and had previously exercised, as the above mentioned provisions relating to postal voters etc, bear witness to.

[122] This myopic and didactic approach towards its duty is reflected in its reply by way of affidavit and submissions made. From what can be discerned from the respondent's response, it would appear to me that the juggernaut presence of the ISA 1960 has a 'shock and awe' effect.

[123] This is seen when the respondent submitted that the respondent cannot enact laws/rules which contravene the ISA 1960. Whilst it is clear that under art 113(5) that any rule made by the respondent shall have effect subject to provisions of federal law, it is inconceivable how any rule, giving effect to voting rights would be inconsistent with the ISA when there is nothing in the ISA which conflicts with the right to vote.

[124] This begs the question — would making rules or providing facilities for voting be contrary to the ISA?

[125] In any case, by not providing the facilities or making arrangements allowing the appellants to vote, the appellants' argument is that their constitutional right to vote is rendered illusory and ineffective: See:

(a) *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; and

(b) *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 (SC).

[126] I agree with the appellants' proposition that provisions regarding fundamental liberties and rights under the Federal Constitution should be construed as generously as is possible within the constraints that they are placed under. It is in this mode that the appellants submit that by its failure to make rules or regulations which would facilitate the appellant's exercise of their voting rights, the respondent had contravened art 8(1) of the FC. The right to equality and entitlement to the equal protection of the law under art 8 demands that detainees under preventive detention laws be treated the same way as unconvicted prisoners who are entitled to vote.

[127] The question one might ask is whether this is a reasonable classification. In my view, it is. This is because though the detainees under the ISA 1960 are detained for *completely different reasons* from unconvicted prisoners who are awaiting trial in normal prisons, the *common factor* is that *both* the *detainees* and the *unconvicted prisoners* are not yet convicted of any offence. To all intents and purposes, they are on the same footing and are placed in the same category of persons who are:

(1) *detained*;

(2) *yet unconvicted*; and

(3) *whose rights to vote remain intact.*

[128] Recent cases have shown that courts now view the provision in art 8(1) as the source of procedural fairness in administrative process (see *Datuk Yong Teck Lee v Public Prosecutor & Anor* [1993] 1 MLJ 295, *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 (though overturned by Federal Court on appeal). It has been accepted that there has to be procedural fairness in depriving a person of his livelihood. For instance if in the exercise of his discretion, a Minister does not give any reason, then it is open for a court to conclude that he had no good reasons for making the decision he did (*Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481).

[129] Article 8(1) has been characterised as all pervading in effect (*Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261), and it has also been said that an unguided and unrestricted power is affected by the vice of discrimination and that art 8(1) strikes at arbitrariness in executive action and ensures fairness and equality of treatment. What happened in this appeal reflects just that. The respondent chose not to activate themselves in addressing the legitimate request of the detainees. They gave preposterous reasons for not making arrangement as requested, which amounts to it being not a reason at all. If the respondent were to be conscious of their constitutional duty they would realise that a violation of art 8(1) is latent, seeing that the appellants are similarly circumstanced as the other prisoners mentioned earlier. I must stress here that I am not suggesting that the appellants are categorised as prisoners in prison since of course they are not. Article 8(1) reflects of being 'similarly circumstanced' not 'exactly circumstanced'.

[130] Given the powers vested in the respondent as outlined above, the question is: why was the respondent indifferent towards ensuring that the appellants could, if they so intend, exercise their voting right by providing facilities such as giving exemption or having polling stations in Kamunting, if that is what it takes, so as to preserve the appellant's constitutional right and by the same token, fulfilling the respondent's constitutional duty?

[131] By failing to provide any arrangement to facilitate the casting of votes by the appellants, the respondent had acted arbitrarily and discriminatorily in contravention of arts 8(1), 10(2) and 119 of the FC.

[132] On this point, my view is, it is not open for the respondent to respond as they did at para 15 of the chairman of the Election Commission's affidavit, that the application of the appellant was a little too late in the day for the respondent to accede to the appellant's request. Looking at the time line of the entire election from the date of notice on 7 March 2004 to the 21 March 2004 as the polling day, the appellants barely had a fortnight in which to make any preparation or application for voting, bearing in mind that they are in detention.

[133] It is hard to accept the respondent's argument that it was 'busy' ('sedang sibuk') preparing for the election to reply promptly to the appellants' letter. In my view, this bureaucratic arrogance is passé. The respondent should be responsive albeit when what is at stake are questions pertaining to the citizens' constitutional rights.

[134] Moreover, the respondent's inaction merely reflects its apathy and careless disregard. This is because the ISA 1960 has been around for a while. It is not a new piece of legislation. It obviously had not occurred to the respondent to ensure that the rights of all eligible electors (in every sense of the word) should be given. The thrust of their duty under art 119 ie to *'conduct elections, exercise control and supervision over the conduct of elections and registration of voters and enforcing that the election officers impart fairness, impartiality and compliance with Part VIII of the FC'*, do not stop short at the perfunctory and superficial role of merely providing the routine physical infrastructure of elections.

[135] It also includes a conscious and responsible effort on their part to ensure that electors are provided with all available facilities in order for them to exercise their voting rights. It is in this manner that the respondent would have fulfilled their duty in ensuring that they satisfy the exacting standards imposed on them by the FC, that they have to impart fairness, impartiality and compliance with Part VIII of the FC.

[136] The simple truth is simply that the respondent was in a state of unpreparedness and indifference. It cannot now be allowed to foist off its responsibility on someone else or on unsustainable grounds which are, to my mind, arbitrary and therefore unreasonable. For otherwise, the concept of 'fairness' and 'impartiality' found in Part VIII of the FC would be meaningless.

[137] In my view, the Supreme Court decision (India) in *Maneka Gandhi v Union of India* AIR 1978 SC 597 had set the stage for a more liberal approach in the interpretation of art 8(1) of the FC.

[138] Our Court of Appeal in *Tan Teck Seng* was quick on the uptake and adopted and applied the test laid down in *Maneka Gandhi*. In *Maneka Gandhi*, the Supreme Court interpreted Article 14(a) of the Indian Constitution (which is in pari materia with art 8(1) of the FC) in the following manner:

> Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principles of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades art 14 like a brooding omnipresence …

[139] Again, in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* [1998] 3 MLJ 289; [1996] 2 AMR 1617 (though this case was overruled later by the Federal Court), the Court of Appeal took its arguments on the liberal

ambit of art 8(1) further. After having held that art 8(1) of the FC imposed a duty on public decision makers to act fairly, Gopal Sri Ram JCA went on to rule that:

> … the duty to act fairly is recognised to comprise two limbs: procedural fairness and substantive fairness. Procedural fairness' requires that when arriving at a decision, a public decision maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of … It follows that if in arriving at a public law decision, the decision maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in its substance.

[140] In this appeal, was there substantive fairness or otherwise?

[141] The appellants firstly wrote to the respondent to ask if it would be allowed to vote. The respondent replied that no arrangements had been made to allow them to do so. A second letter was dispatched to the respondent asking much the same thing. Nothing came of it.

[142] As had been alluded to earlier, the position taken by the respondent speaking through the chairman of the Election Commission was that it was ignorant at best, and disinterested at worst, in not considering the plight of the appellants.

[143] It even cited administrative inconvenience or difficulty as a reason for not taking on the appellants' request. As several persuasive authorities such as *Levesque v Canada (Attorney General)* [1986] 2 FC 287 and *Gould v Attorney General of Canada* [1984] 1 FC 1119 have shown, administrative difficulty is not a reason to bar detainees such as the appellants from exercising their right to vote.

[144] The decision handed down by the respondent that they were under no duty to make provisions for the appellants to cast their vote is seen as not reasonable. The need to be 'reasonable' in order to meet the required standard of substantive fairness was exemplified amply in *Tak Teck Seng* and *Sugumar*. What is apparent here is that the 'reasonableness' in these cases is different from the context found in *Wednesbury*. It would seem that courts now look askance at decisions which cannot be successfully tested against the standard of reasonableness, whilst the *Wednesbury* unreasonableness allows a decision to stay unless it measures up to the standard of unreasonableness.

[145] Thus from the decisions handed down in *Tan Teck Seng* and *Sugumar*, courts have imposed a duty on public decision makers to only hand down decisions which are reasonable. The court's decisions as illustrated above point the way towards ensuring that the principles of equality housed in art 8(1) of the FC confers on individuals the constitutional guarantee of reasonable public law decisions.

[146] The appellants also drew support from the broad and generous approach taken by the South African case of *August & Anor v Electoral Commission & Ors* [1999] SACLR LEXIS 1, which is clearly persuasive.

[147] However, since the way has been paved by authorities such as *Tan Teck Seng*, *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 there is no reason whatsoever for courts in this country to be coy in utilising the principles provided by these authorities.

[148] Even if the court's reception to *August* is lukewarm, I am of the view that the end result is the same. Though various interesting statements emanate from *August*, what stands out is this:

> That the 'right to vote by its very nature imposes positive obligations upon the legislature and the executive'.

[149] In *August*, two applicants, a sentenced prisoner and prisoner in remand awaiting trial, commenced an action against the South African Electoral Commission for not making provisions to facilitate the registration of the applicants as voters, and further, for not allowing them to cast their votes.

[150] The South African Electoral Commission cited, inter alia, administrative, logistical and financial difficulties as a reason if prisoners were allowed to vote in prison.

[151] The Constitutional Court of South Africa held, inter alia, the following:

(a) the right to vote by its very nature imposes positive obligations upon the legislative and the executives (thus the South African Electoral

Commission which was under the duty to compile and maintain voter's rolls imposed an affirmative obligation to take reasonable steps to ensure that eligible voters are registered);

(b) the right to vote is 'so fundamental that a broad and liberal interpretation must be give to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every case should be taken to guard against disenfranchisement';

(c) the right to vote is given in unqualified terms, the applicants retained their rights to vote since Parliament had not passed any law limiting that right;

(d) election laws should be interpreted in a way which 'enables enfranchisement' and which underline 'the positive responsibilities' of the Election Commission in facilitating registration and voting; and

(e) there are a variety of ways in which prisoners would be allowed to cast their vote in practice and an administrative difficulty is not a reason to bar prisoners to exercise their rights to vote.

[152] The learned trial judge in the instant appeal took the view that the South African Constitution, particularly with regard to the powers and duties of their Election Commission is not similar to our Federal Constitution. This dissimilarity he said, also extends to the language of the two Constitutions with regard to the right of a citizen to vote. The learned trial judge thus agreed with learned senior federal counsel Puan Azizah Nawawi who submitted that the language of the South African Constitution is very wide and must be read in that context and is thus of little or no assistance to the instant appeal. The case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 was cited in support. Here, Raja Azlan Shah FC (as His Majesty then was) observed:

> … whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end, the wording of our Constitution itself that it is to be interpreted and applied, and this wording can never be overridden by the extraneous principle of other constitution.

[153] In my view, it would be pertinent to distinguish provisions of the citizen's right to vote in both the C onstitution of South Africa and our Federal Constitution. Ours is housed in art 119 of the FC which basically determines the eligibility to vote upon attaining the age of 21 years, where the elector is resident of the constituency on such qualifying date or is an absent

vote and registered on the electoral role, unless disqualified under cl (3) thereof of any federal law. The appellants do not come within any of the categories of those who are barred or disqualified from voting.

[154] The South African Constitutional provision as to rights of voters appears to be wider. Their s 19 reads:

(1) Every citizen is free to make political choices, which includes the right —

(a) to form a political party;

(b) to participate in the activities of or recruit members for, a political party; and

(c) to campaign for a political party for cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult has the right:

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret, and

(b) to stand for a public officer and, if elected, to hold office.

[155] In comparing the language of our art 119 of the FC and that of s 19 of the South African Constitutional provision on the right to vote, it is clear they are not in pari materia and that the South African Constitution is more expansive.

[156] However, a reading of related provisions in our FC such as that of art 113 where the Election Commission 'may make rules …'; That of s 5 of the Elections Act 1958 '… to exercise control and supervision… ' and shall enforce on the part of all election officers *fairness*, *impartiality* and *compliance* with Part VIII of the Constitution and this Act and Regulation …'; that of s 16(2)(f) of the same Act which allows Election Commission to '… prescribe the place and manner in which votes may be cast and the construction of and manner of ensuring that ballot booths used in the elections are secure and for the issue of ballot paper to electors'. Section 16(2)(l) where the Election Commission can:

> ... prescribe any form as may be necessary or desirable to be used in connection with the matters dealt with in this section or any regulations made thereunder …

[157] It seems clear to point to the fact that though the wordings are dissimilar, the spirit is the same — ie the right to vote by its very nature (and strengthened and supported as it were, by the vigorous presence of arts 8 and 10) imposes positive and affirmative obligations upon the Election Commission and the legislature to take reasonable steps to ensure that eligible voters can exercise their right to vote.

[158] Bearing in mind the differences in language in the two Constitutions, ie our Federal Constitution and the South African Constitution, the critical question I have to ask myself is this: does the difference in language between the two constitutional provisions create any distinction in principle?

[159] Much consideration has gone into this question. I can do no better than to be mindful of the wisdom of Gwyer CJ in *Re Central Province & Bear Sales of Motor Spirit v Lubricants Taxation Act* AIR 1939 FC 1, who said that:

> … Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law these very principles of interpretation compel as to take into account the nature and scope of the Act that we are interpreting — to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be: *AG for New South Wales v Brewery Employees Union* (1908) 6 CLR 469, per Higgins J at p 611.

[160] More importantly, I must emphasise here that I am conscious and aware and have made all due allowance to the differing Constitutional provisions and language used in the two provisions (India and Malaysia). I have also reminded myself at all times of the caution sounded by Gwyer J, in the same case which was applied in *Tan Teck Seng* about pegging our interpretation onto cases decided by foreign courts when construing provisions in their own Constitutions. The relevant passage reads thus:

> The decisions of Canadian and Australia courts are not binding upon us, and still less those of the United States. But where they are relevant, they will always be listened to in this court with attention and respect, as the judgments of eminent men accustomed to expand and illumine the principles of jurisprudence similar to our own … But there are few subjects on which the decisions of other courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis, the decision must depend upon the words of the Constitution which the court is interpreting and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification in another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different senses accordingly.

[161] In this regard, the approach I would take is the same as that taken by the court in *Tan Teck Seng*. In the same way too, I exercised the requisite caution and still find that the differences in language in the two Constitutions referred above is trifling for purposes of interpreting the fundamental right to vote in art 119.

[162] What is of significant is the substance of the respective constitutional provisions (see *Tan Teck Seng*). Looking at the substance of the respective provisions my view is that it can safely be said that this court can adopt the treatment given by the Indian Supreme Court in cases of this genre and adjust it to adapt to our own Constitution.

[163] This is related to the fourth ground of the appellants which states that the learned judge had failed to rule that the rights under arts 8 and 10(1)(a) of the FC are the extension of the rights to vote under art 119, therefore a violation of the rights to vote under art 119 is also a violation of their rights under arts 8 and 10(1)(a) of the FC.

[164] In this connection, the learned trial judge made the following finding:

> To me, the violation of the applicant's right under *arts 8* and *10 of the Federal Constitution* is a non-issue. As stated earlier, the applicants are being detained under the ISA. The ISA is a law enacted under *art 149 of the Federal Constitution* which state that any law introduced for the purposes of curbing any activities that is prejudicial to public order of the security of the country or part thereof is valid notwithstanding that it is inconsistent with the provision of *art 5* (liberty of the person) *art 9* (prohibition of banishment and freedom of movement) *art 10* (freedom of speech, assembly and association) or *art 13* (rights to property). Hence, when a person is detained under the ISA he loses the aforesaid rights guaranteed under the Federal Constitution. Such deprivation of the rights is given by the constitution itself. Thus, the allegation that the Commission was violating the applicant's rights under *art 8* and *10 of the Federal Constitution* is clearly misconceived.

[165] It is my view that the respondent's interpretation of art 149 of the FC vis-à-vis the provisions of the Internal Security Act 1960 where the respondent states that … 'the ISA is a law enacted under art 149 of the FC which *state that any law introduced for the purposes of curbing any activities that is prejudicial to public order or the security of the country...' is valid notwithstanding that it is inconsistent with the provisions of arts 5, 9, 10 or 13, is slightly off the mark.*

[166] In my view what art 149 of the FC really envisages is that any law (such as the ISA) containing provisions designed to stop or prevent any of the

actions or activities listed from (a) to (f) is valid, even if they are in contravention of arts 5, 9, 10 or 13. The legal position is clear. A

[167] The ISA 1960 which was enacted pursuant to art 149 of the FC may or may not contain provisions which infringe the rights mentioned. However it does not, ipso facto, mean that the detainees lose all their constitutional rights guaranteed under the FC, the moment they are detained under the ISA. B

[168] In any case, *there is no provision* in the ISA 1960 which prevents, precludes or bars the appellants from voting. Or putting it in another way, nothing is expressed in the ISA 1960 which explicitly or otherwise prevents detainees from exercising their right to vote. C

[169] The distinction is fine but nevertheless discernible. D

[170] It is therefore misconceived for the respondent and the learned trial judge to say that persons detained under the ISA 1960 *'lose those rights and that the deprivation of those rights is given by the Constitution itself'*. My question is: in what way? How? Neither the respondent nor the learned trial judge explained or expanded on this proposition. Thus we are in an unhappy position of not being fully appraised of that contention. E

[171] In my view, the reference to the curbing of the fundamental rights as stated in art 149 ie arts 5, 9, 10 or 13 relate only to the activities or action manifested in cl (1)(a) to (f) in art 149. In other words, any law enacted to curb these activities ((a)-(f)) may infringe upon the stated fundamental rights. In short, that law would be valid. But voting under art 119 of the FC does not come within the category of 'actions prejudicial to public order' and so the curtailment of the appellants' rights under art 119 does not arise. F G

[172] In my view, the right to vote under art 119 of the FC being an adjunct and part of the fundamental right to freedom of speech and expression enshrined in art 10(1)(a) of the FC must necessarily be read into the process underlying Part VIII of the FC which deals with elections and obligations of the respondent under art 113 of the FC and ss 15 and 16 of the Elections Act. H

[173] Accordingly, what can be extracted from the authorities and views expressed is that the respondent's decision not to allow the appellants to vote has the effect of rendering that decision unreasonable. I

[174] From these authorities, it is clear that the duty to act fairly comprise two limbs: (i) procedural fairness and (ii) substantive fairness. One requiring a decision to be reasonable and the other requiring it to be proportionate. The above authorities and others as alluded to earlier suggest that a positive duty is imposed on public decision makers to only hand down decisions which are reasonable.

[175] And as not to put too fine a point on it, the essence of the above-mentioned decisions which is applicable to the instant appeal is that, the principles of equality enshrined in art 8(1) of the FC, confer on individuals the constitutional guarantee of *reasonable* public law decisions.

[176] This necessarily implies that the concept of *Wednesbury* unreasonableness has seen better days and perhaps would eventually become inexpedient.

[177] In the light of the above, I believe it is open to me to hold that the respondent's decision is either unreasonable or substantially unfair or disproportionate or that it infringes the substantive legitimate expectations of the appellants. In this, I hold that the decision of the respondent was arbitrary. In that connection, my view is that the learned trial judge had misdirected himself, justifying appellate intervention.

[178] Inasmuch as I am conscious of the need to strictly comply with the strict provision of the election laws and rules, there is also a compelling need for the EC to reciprocate by responding speedily and responsibly when requests are made by electors (such as the appellants) to exercise their right to vote. For the EC to ignore and disregard this, manifests unreasonableness on their part. And for learned trial judge to decide the way he did, meant that his findings of fact are flawed and consequently his rulings of law, misdirected.

[179] In the circumstances, the decision of the learned trial judge had occasioned a miscarriage of justice. Thus the relief prayed for are granted to the appellants.

[180] However, the reliefs prayed for in this appeal for damages and consequential orders would have to be heard separately and assessed and submissions are to be taken.

[181] Thus, I would allow this appeal with costs here and below. The decision of the High Court is set aside. Deposit to be refunded to appellants. Damages are to be assessed.

[182] Both my learned brothers Zulkefli Ahmad Makinudin JCA (now FCJ) and Low Hop Bing JCA have read my draft judgment but are not in agreement with it. They have both written separate judgments and are in the majority as I stand now in the minority.

Appeal dismissed with costs.

Reported by Kanesh Sundrum